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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 985

MARRS McLEAN,

Petitioner

v.

STATE OF TEXAS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS, AT GALVESTON, TEXAS, AND BRIEF AND AUTHORITIES IN SUPPORT THEREOF.

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INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Preliminary statement	1
Grounds of jurisdiction and reasons for allowance of the writ	5
Assignments of error	8
Prayer for writ	9
Brief in support of petition	11
Opinions of the courts below	11
Jurisdiction	11
Cases believed to sustain jurisdiction	12
Statement of the case	12
Specifications of error	12
Argument	13
Summary of argument	13
Point A	13
Point B	20
Conclusion	23

Table of Cases Cited

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107	12
Coombes v. *Getz*, 285 U. S. 434	17
Ferris v. *Kimble*, 75 Tex. 476	12
Fleming v. *Fleming*, 264 U. S. 29, 68 L. Ed. 547	12
Great Northern Ry. Co. v. *Sunburst O. & R. Co.*, 287 U. S. 358, 77 L. Ed. 360	12, 16
Great Northern Ry. Co. v. *Merchants Elevator Co.*, 256 U. S. 285, 66 L. Ed. 943	12
Humphries-Mexia Co. v. *Gammon*, 254 S. W. 296	24
Humble Oil & Refining Co. v. *Ellison*, 132 S. W. 2d 395	22
Humble Oil & Refining Co. v. *Reclamation Co.*, 58 S. W. 2d 1084	22
Interstate Commerce Comm. v. *Cincinnati, New Orleans & T. & P. Ry. Co.*, 167 U. S. 479, 42 L. Ed. 243	12

Page

Lone Star Gas Co. v. *Ray Gas Co.*, 164 S. W. 2d 508... 22
Quintana Petroleum Co. v. *Commissioners of Internal Revenue*, 143 F. 2d 588..... 16
Rio Bravo Oil Co. v. *Weed*, 52 S. W. 2d 1086..... 22
Sacramento Nav. Co. v. *Salz*, 71 L. Ed. 663..... 23
Sheffield v. *Hogg*, 77 S. W. 2d 1021..... 17
Sheppard v. *Stanolind Oil & Gas Co.*, 125 S. W. 2d 649.. 19
Standard Oil & Gas Co. v. *Terrell*, 183 S. W. 2d 743.... 15
State National Bank v. *Morgan*, 143 S. W. 2d 757..... 22
Stephens County v. *Mid Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290..... 6,12,14
Texas Co. v. *Davis*, 254 S. W. 304..... 24
Tidal Oil Co. v. *Flanagan*, 263 U. S. 444, 68 L. Ed. 382.. 12
Waggone Estate v. *Wichita County*, 273 U. S. 113, 71 L. Ed. 566..... 6,12

STATUTES CITED

Revised Civil Statutes of Texas, Article 4676..... 13
Vernon's Annotated Civil Statutes, Article 3713..... 7,8

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STATE OF TEXAS.

PETITION FOR WRIT OF CERTIORARI TO THE FIRST COURT OF CIVIL APPEALS AT GALVESTON, TEXAS, AND AUTHORITIES IN SUPPORT THEREOF.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Marrs McLean, is seeking a writ of certiorari to the courts of last resort in Texas against their action to the prejudice of petitioner in denial of his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States; and, as preliminary to the formal grounds presented herein, he makes the following:

Preliminary Statement

This was a suit brought by the State of Texas, respondent, against petitioner, Marrs McLean and Stanolind Oil

& Gas Co., for ad valorem taxes on an alleged interest in realty. Judgment was rendered for respondent against petitioner in the trial court. The case was appealed to the Court of Civil Appeals and there affirmed, with written opinion of that Court reported in 181 S. W. 2d, 725 (Copied herein, R. 21-24). Motion for rehearing was filed (R. 25-27) and overruled (R. 28).

Application for writ of error was timely made to the Supreme Court of the State of Texas (R. 29-42), which was refused on October 25, 1944 (R. 50); and motion for rehearing on said application, duly and timely filed (R. 50-58), was, as the final judgment in this cause, overruled on the 6 day of December, 1944 (R. 58-59).

The pleadings and facts as developed in the case, as shown by the opinion of the Court of Civil Appeals, were that petitioner, Marrs McLean, was the owner of certain oil, gas, and mineral leases on land in Galveston county, Texas, and that petitioner on the 18th day of March, 1931 sold and conveyed and assigned said leases to the Yount-Lee Oil Co., and, following the detailed description of the properties described in the assignment (R. 18), it stated the consideration therefor, which is quoted as the same appears on pages 19-20 of the record, as follows, to-wit:

> "The consideration for this transfer and assignment of said above described oil, gas and mineral leases and physical properties and equipment is as follows:
>
> "(a) The sum of One hundred thousand ($100,000.00) Dollars cash, receipt of which is hereby acknowledged by Grantor;
>
> "(b) Two hundred thousand ($200,000.00) Dollars, due and payable six (6) months after the date hereof, and Two Hundred Thousand ($200,000.00) Dollars due and payable twelve (12) months after the date hereof; said deferred payments to bear no interest;

"(c) Two Million ($2,000,000.00) Dollars to be paid out of one-eighth (1/8) of the (gross) oil produced and saved from the lands covered by this assignment, if, as and when produced and saved, and only in such event; it being expressly understood in this connection that said Yount-Lee Oil Company shall be under no obligation whatever to Grantor herein to drill upon or develop said land, or any part thereof, for oil.

"There is reserved and excepted from this assignment a royalty of twenty five (25%) per cent of the oil produced and saved from the lands covered by this assignment, out of which twenty-five (25%) per cent royalty all outstanding royalties (including royalties due lessors under the terms of said leases) and all overriding royalties are to be paid, and Grantor is to receive the balance of said twenty five (25%) per cent royalty; *it being understood in this connection that said YOUNT-LEE OIL COMPANY shall in any event be entitled to receive seventy-five (75%) per cent of the oil produced and saved from said land, and that all outstanding royalties, overriding royalties and/or interest of any character in the oil in, under or produced from said land shall be charged against* the twenty-five (25%) per cent royalty herein reserved." (Emphasis ours.)

The evidence was undisputed that it was the intent and purpose of the parties to the assignment specifically to make and constitute the obligation of $2,000,000.00 "personal property and not an interest in land as those phrases are used in the taxing statutes; and after Yount Lee Oil Company acquired the leases it regarded itself as owner of 75% of all the oil under and produced from the lands covered by said leases, and paid all ad valorem as well as gross production taxes due thereon, treating and considering petitioner's said obligation of $2,000,000.00 as personal property and not an interest in land; and the Stanolind Oil & Gas Company after acquiring said leases from the

Yount Lee Oil Company on July 31st, 1935, to the year 1939, regarded itself as the owner of, and rendered and paid taxes on 75% of all oil under and produced from the lands covered by said leases, as real estate. The Stanolind, however, in the year 1939, for the first time declined to pay the ad valorem taxes on so much of the 75% as represented the oil payment, and this suit is to recover the ad valorem taxes subsequent to the year 1939; and the Court rendered judgment against McLean in the sum of $8,444.19 for the taxes for four years preceding the filing of this suit, which judgment was affirmed by the Court of Civil Appeals, and adopted by the Supreme Court of Texas in refusing petitioner's application for writ of error, and motion for rehearing thereon on the 6 day of December, 1944, thereby constituting the final judgment in the case.

In its opinion the Court of Civil Appeals adopted the facts of the trial court, as shown in said opinion as follows:

"The Court expressly found that the appellant and the attorney for the transferee carefully worded the transfer with the intention of making the oil payments personal property so as to place the burden on the transferee of liability for ad valorem taxes on the full 75%, to the end that appellant should not have to pay any part of the ad valorem taxes thereon." And further: "Also it was undisputed that the Yount-Lee paid all ad valorem taxes on the 75% so long as it continued to own same, as well as paid 75% of the production tax. Thereafter, on July 31, 1935, the Yount-Lee disposed of the working interest in said leases, and on the same day the Stanolind acquired it. And the Stanolind continued to pay taxes in the same way as the Yount-Lee had done, until the year 1939" (R. 22-23).

The Court of Civil Appeals in its opinion, after finding the above facts, affirmed the judgment of the lower court in the following language:

> "If, in fact, the entire working-interest, to the extent of 75% of the mineral estate, passed by the transfer to the Yount-Lee, as the parties intended and supposed, then, necessarily, the oil-payment obligation would be personal property. But the intentions of parties cannot change the character of an estate which is fixed by law, and which they by their acts create. When the appellant retained the right to share in the oil production to the extent of 12½% thereof, or its money equivalent, he retained the right to share in the profits—in the profits a prendre out of the 75% working interest. Such right is an interest in land. Sheffield *v.* Hogg (Sup. Ct.) 77 S. W. 2, 1021" (R. 23-24).

Grounds of Jurisdiction of the Supreme Court and Reasons for the Allowance of the Writ

First Ground

The Supreme Court of the United States has jurisdiction of this cause because the Texas Courts in this case have erroneously adjudged against Petitioner and taxed as real estate in Galveston County, Texas, said obligation of $2,000,000.00 owed him as a part of the consideration for the assignment of the leases, thereby ruling that he was the owner of the realty conveyed by his assignment; whereas, it was, under the settled laws of Texas, personal property taxable in Bexar County, Texas, the residence of assignor, the petitioner, which the tax authorities of Galveston County intentionally and systematically, from 1931 to 1939, exempted from land taxation, holding it intangible personal property in the same class as all other personal property of like kind, of citizens of Texas. Thereby said tax authorities of Galveston County, and the Courts of Texas, in

sustaining their action in now holding and adjudging said obligation as realty instead of personalty, have denied to petitioner the equal protection of the laws of Texas and the due process of law, in contravention of the second clause of the first section of the 14th Amendment to the Constitution of the United States, as construed in the case of *Waggoner Estate* v. *Wichita County*, 273 U. S., 113, 71 L. Ed. 566.

SECOND GROUND

This Court has jurisdiction of this cause because of the error of the Courts of Texas in denying petitioner the equal protection of the laws of Texas, which he expressly relied upon in his Motion for Rehearing in the Court of Civil Appeals and in his application for writ of error to the Supreme Court of Texas, guaranteed to him under the second clause of the first section of the 14th Amendment to the Constitution of the United States, in that the decision and action of said Texas State courts in construing the statutes of taxation in Texas, "have adjudged said statutes to mean one thing for some cases, and another thing for others," because, by their erroneous ruling in this cause said obligation of $2,000,000.00 (which was a part of the consideration, based on a percentage of oil to be produced) has been treated for taxing purposes as real estate, in Galveston County, Texas, instead of personal property taxable in Bexar County, Texas where your petitioner resides; and in so deciding, the Supreme Court of Texas has denied petitioner the equal protection of the law, in this—that the Supreme Court of Texas prior to the date of said assignment had construed such obligations to be personal property, taxable in the county of the residence of the owner thereof, as is shown by the opinion of the Supreme Court of Texas in the case of *Stephens County* v. *Mid Kansas Oil & Gas Co.*, 113 Tex. 160; and in this case the

Supreme Court of Texas has changed its former ruling, with retroactive effect, in classifying said obligation as real estate, when under its former decision, at the time the contract was made, the Supreme Court had held and classified it to be personal property.

THIRD GROUND

This Court has jurisdiction of this cause because the Texas Courts, in deciding that said obligation of $2,000,000.00 was real estate instead of personal property, erroneously construed the intent and purpose of the parties to the contract, contrary to and in violation of the uniform construction by the Texas courts of Article 3713, Vernon's Annotated Civil Statutes of Texas, which adopts the common law rule of evidence; one of which is quoted under the statute as Rule 21, to-wit: "A prior or contemporaneous parol agreement consistent with and forming a part of the contract is to be construed with the written part thereof," in this, that the parties to said assignment orally agreed and understood by its terms that said obligation of $2,000,000.00 forming a part of the consideration of said assignment, should be personal property and not a reservation of an interest in the oil; and thereby the Texas Courts, in so deciding, have adjudged said statute to mean one thing for petitioner and another thing for others, as shown by its opinion as follows:

"If, in fact, the entire working interest, to the extent of 75% of the mineral estate, passed by the transfer to the Yount-Lee, as the parties intended and supposed, then, necessarily, the oil-payment obligation would be personal property. But the intentions of parties cannot change the character of an estate which is fixed by law, and which they by their acts create."—and in so ruling petitioner has been denied the equal protection of the laws of Texas,

in violation of the equal protection clause of the 14th Amendment to the Constitution of the United States, and the 5th Amendment to said Constitution.

FOURTH GROUND

This Court has jurisdiction of this cause because the Texas courts, in refusing to give effect to the express verbal intention placed by the parties upon the "worded transfer" making the oil payments personal property, have violated the uniform construction by the Texas Courts of Art. 3713 Vernon's Annotated Civil Statutes, which adopts the common law rule permitting parol evidence to show the intention of parties where the words in a written instrument are doubtful, making the contract ambiguous when applied to the subject matter thereof; and in so deciding have construed said statute contrary to the uniform construction by the Supreme Court in other cases, when the Court, in its opinion held "It is therefore immaterial what the purpose and intention of the parties to the transfer were at the time they drafted said transfer, except as the same is expressed by the terms of said transfer," and in so holding they denied petitioner the equal protection of the law of the State of Texas, in violation of the equal protection clause of the 14th Amendment to the Constitution of the United States.

Assignments of Error

Supplementary to and prayed to be considered upon the granting of the writ of certiorari, upon the merits of the case, petitioner presents the following assignments of error.

First Assignment of Error

The Court of Civil Appeals erred in affirming the judgment of the trial court, and the Supreme Court in refusing

petition for writ of error thereby adopting the ruling of the Court of Civil Appeals, in holding that the obligation of $2,000,000.00 as a part of the consideration for the assignment, to be paid out of 1/8th of the gross oil produced and saved, is an interest in realty, taxable in Galveston county, Texas, instead of being personal property taxable in the county of the residence of petitioner, Bexar county, Texas.

Second Assignment of Error

The Supreme Court of Texas, by its final judgment in overruling petitioner's motion for rehearing, erred in not granting said writ of error and reversing the judgment of the lower court and rendering judgment in favor of petitioner, because of the error of said courts, and the Supreme Court in not correcting the same, in holding that petitioner is the owner of the interest as realty on which judgment for taxes was rendered against him.

WHEREFORE your petitioner most respectfully prays that a writ of certiorari be issued out of this Honorable Court, directed to the Honorable Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, Texas, commanding that court to certify and forward to this Court for its review and determination, on a day therein to be named, a full and complete transcript of the record and all proceedings in the case of Marrs McLean v. The State of Texas, being No. 11,628 on the docket of that court, wherein this petitioner is designated as Appellant, and the State of Texas as Appellee; that the judgment of that court be reversed by this Honorable Court, and that the judgment of the District Court, which was affirmed by said Court of Civil Appeals and the Supreme Court of Texas, be reversed and here rendered in favor of petitioner against respondent, the State of Texas; that Respondent, the State of Texas, take nothing by its suit against petitioner, and all costs.

And since the proceedings of said Court of Civil Appeals have, by the refusal of your petitioner's application for writ of error addressed to the Supreme Court of Texas, been in legal effect by that court approved, your petitioner prays that writ of certiorari be issued to that Court (if, under the facts of this record such be required), and that the relief hereinabove asked as against the order of that tribunal approving as final the judgment and decree of said Court of Civil Appeals be granted to your petitioner, so that the wrongs and injuries inflicted upon him be by this Honorable Court revised, reviewed and corrected, and that he be given the relief as herein sought and prayed for.

Your petitioner prays for such other and further relief in the premises as this honorable court, upon a hearing of this petition and the cause, may deem just.

WILLIAM D. GORDON,
Beaumont, Texas,
Attorney for Petitioner.

Of Counsel:
E. E. EASTERLING.

[There is filed with this petition the requisite duly authenticated and certified copy of the complete record in this cause, under the hand and seal of the Clerks of the Court of Civil Appeals and of the Supreme Court of Texas.]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 985

MARRS McLEAN,

Petitioner,

vs.

STATE OF TEXAS

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

I

Opinions of the Courts Below

The opinion of the Court of Civil Appeals in this cause is reported in 181 S. W. 2d, 725; a copy of which is also contained in the record, pages 21-24.

II

Jurisdiction

(1) The date of the final judgment of the Supreme Court of Texas in overruling Petitioner's Motion for rehearing on his application for writ of error is December 6, 1944.

(2) The grounds of jurisdiction of this Court are set out on pages 5 to 8 of the Petition for writ of certiorari,

which are referred to and made a part hereof as fully as if recopied herein.

(3) The cases believed to sustain said jurisdiction are as follows:

Waggoner Estate v. *Wichita County*, 273 U. S. 113, 71 L. Ed. 566;

Great Northern Rwy Co. v. *Sunburst O. & R. Co.*, 287 U. S. 358-367, 77 L. Ed. 360;

Interstate Commerce Comm. v. *Cincinnati, New Orleans & T. & P. Rwy. Co.*, 167 U. S. 479, 42 L. Ed. 243-253;

Gt. Northern Rwy. v. *Merchants Elevator Co.*, 256 U. S. 285-291, 66 L. Ed. 943;

Tidal Oil Co. v. *Flanagan*, 263 U. S. 444, 68 L. Ed. 382;

Fleming v. *Fleming*, 264 U. S. 29, 68 L. Ed. 547;

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107;

Ferris v. *Kimble et al.*, 75 Tex. 476;

Stephens County v. *Mid Kansas Oil & Gas Co.*, 113 Tex. 160.

III

Statement of the Case

This has already been stated in the preceding petition on pages 1-5, which is hereby adopted and made a part of this brief.

IV

Specifications of Error

As a supplement to the grounds of jurisdiction, assignments of error are contained in the petition for certiorari, which are on pages 8-9, and are hereby adopted and made a part of this brief.

ARGUMENT

Summary of the Argument

POINT A. As to the jurisdiction of the Supreme Court of the United States in this cause.

The established law of the State of Texas pertaining (a) to ad valorem taxation upon segregated and severed mineral rights as real estate, and (b) pertaining to taxation of individual personal rights, has been reviewed by this Court in the case of *Waggoner Estate* v. *Wichita County, supra,* wherein the jurisdiction of this Court was sustained.

The question there presented was "that the bill assailed the tax assessed as illegal and in violation of the due process and equal protection clauses of the 14th Amendment, in that appellant's interest in the oil leases up to $718,300 of the assessed value had been erroneously treated for taxing purposes as real estate in Wichita County instead of personal property taxable in Tarrant county, where the lessor resided."

The Supreme Court of Texas in the case of *Ferris* v. *Kimble, supra,* construed Article 4676 of the then Revised Civil Statutes of Texas (which have undergone no change since that time) "Having reference to State and county taxes provides that all property, real and personal, except such as is required to be listed and assessed otherwise, shall be listed and assessed in the county where it is situated." "Article 4671 relating to the same subject makes personal property include all goods, chattels and effects, and all monies, credits, bonds and other evidences of debt owned by citizens of the State, whether the same be in or out of the State," and the Court concludes, in its decision, as follows: "Intangible personal property such as credits are taxable only at the place of residence of the owner, without

regard to where they are kept or deposited, and equally without regard to how they were earned or to the place of residence of the debtor."

The Supreme Court of Texas, in the case of *Stephens County* v. *Mid Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566, in construing the above taxation statutes on June 30th, 1923, decided the following obligation in a lease contract to be personal property and not real estate, to-wit:

> "The gas or oil in paying quantities became the property of the parties of the second part, their heirs or assigns, who were obligated to pay to the parties of the first part, their heirs or assigns, the market price of 1/10th of the gas sold, and to deliver to the parties of the first part, their heirs or assigns, ⅛th of the oil, unless they elected to pay the market price of such oil instead of making delivery thereof."

And the court in so deciding said:

TEST OF OWNERSHIP

> "*Ownership of the gas and oil in place meant having the exclusive right to possess, use, and dispose of the gas and oil. The grantors were clearly divested of the right to either possess, use, or dispose of the gas and oil in place in the lands described in the instruments here involved as soon as the instruments were executed. At the same instant, the right to possess, use, and dispose of such gas and oil in place passed to the grantees in said instruments and to their assigns.* Complete divestiture of title to the gas and oil could hardly be more clearly evinced than by the necessity for an express grant or reservation of even enough gas for domestic use in the grantors' dwellings. Dominion over a thing could not well be completer than it is in those persons who may, at their will, assign it to any other person, with or without consideration, for a time which may be forever. Sims v. Sealy, 53 Tex. Civ. App. 518, 116 S. W. 630. The fact that whoever owns the gas

> and oil, under these instruments, is subject to certain obligations to the former owners, express and implied, with regard to exploration for, and production of, the gas and oil, and with regard to the payment of royalties, in no wise reinvests the former owners with title. Nor does the possibility of future reversions accomplish present reinvestitures of title in the former owners." (Emphasis ours.)

The opinion in that case was construed by this Court in the case of *Waggoner* v. *Wichita County*, *supra*, in which the distinction was clearly marked between a lease that reserved an interest in the oil in place and one, as in the *Stephens County* case, which gave the lessee the option to pay the stipulated royalties in oil or cash, in that part of the opinion which reads as follows:

> "The case of Stephens County v. Mid Kansas Oil & Gas Co., supra, is relied upon by appellants, but in that case the lease, in other respects similar to those now under consideration, provided that the lessee at his option could pay the stipulated royalties in oil or cash. *It thus conferred on the lessee the essence of ownership: possession, with unrestricted power of appropriation and disposal of the oil.* The lessee was therefore properly fixed as the owner." (Emphasis ours.)

It will be noted that it was after the decision in the *Stevens* case that the contract was entered into between petitioner and the Yount-Lee Oil Company, which decision, by implication of law, was written into and made a part of the contract.

In the case of *Standard Oil & Gas Co.* v. *Terrell*, 183 S.W. 2d 743, it is held:

> "The laws which subsist at the time and place of the making of the contract and where it is to be performed enter into and form a part of it as if they were expressly referred to or incorporated in its terms.

> Smith v. Elliott & Deats, 29 Tex. 201; Kerr v. Gallaway, 94 Tex. 641; McCracken v. Hayward, 2 Howard 612, 11 L. Ed. 307."

In the recent Texas case of *Quintana Petroleum Company* v. *Commissioners of Internal Revenue*, by the Court of Appeals, 5th Circuit, June 27th, 1944, reported in 143 Fed. Rep. 2d series, 588, it is held:

> "The obligation of the taxpayer to pay 1/4th of the net proceeds arising from its operation arose out of a personal covenant. Such obligation vested no interest in the payee in the oil and gas in place, and entitled the payee to no percentage depletion on the amount received. The taxpayer's title to the oil and gas in place was unaffected thereby. This it recognized, for it claimed (and was allowed) percentage depletion on the gross income from production without deduction for net-profit payments.
>
> "An outright assignment is a sale, not a sub-lease. Net-profit payments are payments on the purchase price. As capital investments they may not be treated as business expenses or as rentals or as royalties. Cf. Commissioner v. Rowan Drilling Co., 5 Cir. 130 F. 2d 62."

In the case of *Great Northern Rwy. Co.* v. *Sunburst Oil & Refining Co.*, 77 L. Ed. 360, *supra*, it was held, as reflected by head-note # 2:

> "A carrier and shipper are presumed to have bargained with each other on the basis of existing law, including the judicial construction placed on a statute."

The tax authorities and the Courts of Texas as agents of the State are required by the 14th Amendment of the national Constitution to treat all citizens alike in their rights of contract.

As said in the case of *Great Northern Rwy. Co.* v. *Sunburst Oil & Refining Co., supra:*

> "Adherence to precedent as establishing a governing rule for the past in respect of the meaning of a statute is said to be a denial of due process when coupled with the declaration of an intention to refuse to adhere to it in adjudicating any controversies growing out of the transactions of the future."

In that case, involving a contract between a carrier and a shipper, it was said:

> "Carrier and shipper would be presumed to bargain with each other on the basis of existing law. Coombes v. Getz, 285 U. S. 434, 76 L. Ed. 866, 52 S.C.T. 435."

And although the petitioner in that case first asserted its federal right in motion for rehearing, of the equal protection of the law, by the failure of the Supreme Court of Montana to adhere to its former decision under which the contract was made, nevertheless it was held that it was timely raised, as said by the Court in the following language:

> "The second (referring to the above constitutional right) is a challenge to the constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and another thing for others. This latter objection the petitioner could not make in advance of the event."

The Court of Civil Appeals in the instant case erroneously bases its decision on the case of *Sheffield* v. *Hogg*, 77 S.W. 2d 1021, dated December 31, 1934. Petitioner's assignment of said leases to the Yount-Lee Oil Co. was made long prior thereto, on to-wit, March 18, 1931, under the law as it then stood—as announced in the case of *Stephens County* v. *Mid-Kansas Oil & Gas Co.*, which was decided

June 30, 1923, and was so interpreted by this Court in the case of *Waggoner Estate* v. *Wichita County, et al.*, in its decision dated January 3, 1927. If the decision in the case of *Sheffield* v. *Hogg, supra*, by its application of the common law or the construction of the statutory law of the State of Texas, has changed the law as it stood at the time of petitioner's assignment of said leases to the Yount-Lee Oil Company, *such changes could not be given the retroactive effect of so altering said assignment and conveyance, by petitioner to the said Yount-Lee Oil Company, to the enormous extent of reinvesting in McLean the title to real estate which, by said assignment and conveyance, he had invested in the Yount-Lee Oil Company—the grantor of the Stanolind Oil & Gas Company.* However, the decision in the case of *Sheffield v. Hogg, supra, neither made nor indicated any change of the law as announced in the case of Stephens County* v. *Mid-Kansas Oil & Gas Co.*, because, as shown by the provisions in the leases copied in the opinion, *the lessors retained 1/8th of the oil, in kind, to be delivered to them as a royalty when produced.*

It was the same type of lease construed in *Waggoner's* case. This is shown by the announcement in the opinion as follows: "The real question in this case is whether a royalty interest under an ordinary oil and gas lease, is a taxable interest in real estate, and by expression 'ordinary oil and gas lease' *is meant any one of the several forms of contract which gives to the lessee the exclusive dominion and control of the oil and gas in place in the ground and provides for the delivery of a fractional part of the oil, after it is produced, to the lessor.*" The facts of the case did not involve the obligation of payment in money, based upon a percentage of the gross production of oil as a consideration for the conveyance of the entire estate in the oil, without reservation of even a lien thereon to secure said money obligation. It is therefore obviously apparent that

that part of said opinion is pure dictum, which might be claimed to include a covenant as a consideration to pay in money for the assignment of the leases based upon a percentage of the oil to be produced, and had no effect upon the law as it stood—amounting only to the expression by the Court, as a law commentator, upon "clauses in leases not actually before it." *Sheppard* v. *Stanolind Oil & Gas Co.*, 125 S.W. 2d 649. (Italics ours.)

The opinion of the Court of Civil Appeals in this case says:

> "Appellant does not undertake to urge that the law as it existed at the time the transfer was drawn up has been changed by the holding in Sheffield v. Hogg, supra, and to assert any rights to a corresponding change in construing said instrument by reason of such change."

Here is a plain indication that the *Sheffield* v. *Hogg* case had changed the law several years after the contract in question was made, and that the Petitioner was not asserting "any rights to a corresponding change in construing said instrument by reason of such change."

It is manifest that Petitioner could not anticipate that the court would construe the *Hogg* case as having changed the law under which his contract was made; nor could he anticipate that if the law was changed by that case there was any duty at that stage of the proceedings laid upon him to assert his constitutional rights that such change could not retroactively annul and destroy his lawfully invested rights under his contract of March 18, 1931.

When such holding was made as a predicate to destroy his contractual rights, he laid the predicate by timely motions by asserting that such action was in violation of the Federal Constitution, which, as held by the United States Supreme Court, in the *Sunburst* case, was "timely raised," and "a challenge to the constitutional validity of the ruling

in this case, whereby the statute is adjudged to mean one thing for some cases and another thing for others. This latter objection the Petitioner could not make in advance of the event." (See page 17, *supra.*)

POINT B. Argument and authorities in support of the contention that the assignment of the leases, as made by its terms and the consideration therein expressed (including the obligation of $2,000,000.00 to be paid from the percentage of the gross oil, when produced), is to be construed in the light of the surrounding circumstances together with the expressed oral intention by the parties of the meaning of its terms, and their acts under the contract consistent with such meaning, and inconsistent with any other meaning.

The Court of Civil Appeals in its opinion, which opinion has been presumptively adopted by the Supreme Court of Texas in refusing writ of error, has erred in denying in this case that the above contention is the law of Texas. The opinion shows the undisputed facts on which the court acted as follows:

> "The court expressly found that the appellant and the attorney for the transferee carefully worded the transfer with the intention of making the oil-payment personal property so as to place the burden on the transferee of liability for ad valorem taxes on the full 75%, to the end that appellant should not have to pay any part of the ad valorem taxes thereon. Also, it was undisputed that the Yount-Lee paid all ad valorem taxes on the 75% so long as it continued to own same, as well as paid 75% of the production tax. Thereafter, on July 31, 1935, the Yount-Lee disposed of the working interest in said leases, and on the same day the Stanolind acquired it. And the Stanolind continued to pay taxes in the same way as the Yount-Lee had done, until the year 1939. The Stanolind then, for the first time, contended that the unpaid portion of the oil-payment obligation was, for taxation purposes, an

> interest in land, and declined to pay ad valorem taxes on so much of the 75% as represented the oil-payment."

And the court's opinion upon the above facts in connection with the assignment, held:

> "It is therefore immaterial what the purpose and intention of the parties to the transfer were at the time they drafted said transfer, except as the same is expressed by the terms of said transfer."

And further:

> "If in fact the entire working-interest, to the extent of 75% of the mineral estate, passed by the transfer to the Yount-Lee, as the parties intended and supposed, then, necessarily, the oil-payment obligation would be personal property. But the intentions of parties cannot change the character of an estate which is fixed by law, and which they by their acts create."

The opinion then follows with the erroneous assumption from said assignment and the facts and circumstances above related that "when the appellant (petitioner) retained the right to share in the oil produced to the extent of 12½% thereof or its money equivalent he retained the right to share in the profits — in the profits a prendre out of the 75% working interest. Such right is an interest in land." It is obvious that such assumption has no foundation in the facts as the assignment, by its terms and the meaning placed thereon by the parties, shows affirmatively to the contrary, to-wit, that McLean conveyed the entire estate of 75% in the oil in place, and as a part of the consideration therefor Yount-Lee Oil Co., covenanted to pay $2,000,000.00 based upon a percentage of 12½% of the gross production of the oil, if and when produced, and orally agreed that such obligation of payment should be personal property.

The Commission of Appeals in *State National Bank* v. *Morgan*, 143 S.W. 2d 757, held that in construing the language of leases bearing on an oil payment as bonus, the parol evidence is admissible and competent which discloses the intention of the parties.

In the case of *Humble Oil & Refining Co.* v. *Reclamation Company*, 58 S.W. 2d 1084, the Court said:

> "Both parties contend, in their briefs, that this court should adopt the interpretation of the contract placed thereon by the parties (though they differ in this case as to what that intention was). This rule has application though the contract is not ambiguous."

In the case of *Rio Bravo Oil Company* v. *Weed*, 52 S. W. 2d 1086, Judge Leddy for the Commission of Appeals said:

> "It is well said by the Court in the case of Livingston Oil Corporation v. Waggoner (Tex. Civ. App.) 273 S. W. 903, 906: 'It is to be assumed that parties to a contract know best what was meant by its terms, and are the less liable to be mistaken as to its intention; that each party is alert to protect his own interest and to insist on his rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it to be'."

It is held in the recent case of *Humble Oil & Refining Co.* v. *Ellison* (Smedley, Comm. of App., opinion adopted), 132 S. W. 2d 395, that the written language in a conveyance under the statute of frauds can be explained by parol, if there is an ambiguity in the language of the instrument, or when applied to the subject matter.

The Supreme Court of Texas in the case of *Lone Star Gas Co.* v. *Ray Gas Co.*, 164 S. W. 2d 508, held:

> "that the practical construction placed upon a contract by the parties themselves constituted the high-

est evidence of their intention that whatever was done by them in the performance of the contract was done under its terms as they understood and intended same should be done."

In the case of *Sacramento Nav. Co.* v. *Salz,* 71 L. Ed. U. S. Supp. Ct. 663, it was held:

"But a contract includes not only the promises set forth in express words, but in addition all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made."

Conclusion.

Since taxes on land cannot be enforced against any one except the owner, the test of what constitutes ownership is the only logical inquiry.

This has been authoritatively settled in Texas by its highest court in the Stephens county case, quoted above. It is an exhaustive opinion. The Court said:

"The Honorable Court of Civil Appeals has certified to this Court *the single question, whether the appellee acquired under the above mentioned instrument, such interest or such estates in land as were subject to separate taxation.* The certificate recites that numerous suits involving the question are pending, and that its *authoritative determination is of the utmost importance.*

"*Looking to the manifest intent of the parties,* we do not think it difficult to arrive at a correct answer to the questions. *The subject matter of each contract was oil and gas in place. The principal consideration was royalties dependent upon the marketing of the gas and oil*" (Emphasis added).

In this outstanding case the Court cites its own previous decisions on the point, and decisions of Pennsylvania,

Kentucky, New Jersey, Illinois, California and Louisiana —the general law of oil and gas of these producing states. The Stephens County case was cited and reaffirmed by the Texas Supreme Court in *Humphries-Mexia Co.* v. *Gammon,* 254 S. W. 296; *Texas Company* v. *Davis,* 254 S. W. 304, and numerous other cases, without dissent or qualification.

In the last named case the court, speaking through the same judge, said (p. 309):

> "Our object is to announce a rule which is truly consonant with the real intent of the contracting parties."

Such is the declared law of Texas in the decisions of its highest courts. The test so laid down was as above quoted fully approved in Waggoner's appeal.

In other words, Waggoner's jurisdictional ground rested upon his averment of fact that he retained no title to the minerals in place but was nevertheless taxed as a realty owner, when in fact he was not in such class but was in the class of realty owner of minerals in place—unlike Hill et al., in the Stephens County case. Their contracts were totally different as to investiture of title to the minerals in place.

If Waggoner's facts had been as the facts considered in the Stevens case, his appeal, under Justice Stone's opinion, would manifestly have been upheld by the court.

A tax on land is not a tax against a person. It is a tax *in rem.*

The right of ownership in land is a right of private contract with which the agencies of the state have no concern except to enforce and protect.

Ad valorem taxes concern only the owner who is interested to prevent a tax lien being foreclosed against his property. That is why the court erred in refusing to hold

these parties to the terms of their contract. The state can make no contract for them at variance with their intentions; nor can it make a non-owner pay an owner's tax.

In this case it sued both McLean, who did not own the land, and the Stanolind Company which did own it. The State's agencies levied the tax against a non owner, and by judicial process ordered the sheriff to collect the taxes due by the owner against McLean, who ceased to be the owner in 1931, when he sold and conveyed to Yount who, in turn, four years later, sold and conveyed it to the Stanolind.

Such arbitrary action by the agents of the State in this case sets at naught the safe-guards of the Federal Constitution.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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24

SUPREME COURT OF THE UNITED STATES

No. 985

MARRS McLEAN, *Petitioner*

vs.

THE STATE OF TEXAS, *Respondent*

BRIEF OF RESPONDENT THE STATE OF TEXAS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	Page
Additional Statement	1
Reply to Grounds of Jurisdiction	2, 3, 4, 5
Summary of Argument	6
Point One	6
Point Two	7
Point Three	8

INDEX OF AUTHORITIES

Amer. Liberty Oil Co. v. State, 125 S. W. (2) 1107	9
Amer. Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231	6
Barnsdall v. Bradford Gas Co., 225 Pa. 338, 74 A. 207, 26 L. R. A. (N. S.) 614	9
Bracken v. Van Zandt Co., 74 S. W. (2) 540	9
Caldwell v. Texas, 137 U. S. 692, 34 L. Ed. 816	2
Cobb v. Downing, 1 S. W. (2) 508, Appeal Dis. 278 U. S. 560, 73 L. Ed. 506, Cert. Den. 278 U. S. 646, 73 L. Ed. 559	8
Edward Hinds Yellow Pine Trustees v. Martin, 268 U. S. 458, 69 L. Ed. 1050	7
Enterprise Irr. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 61 L. Ed. 644	3
Equitable Life Assur. v. Brown, 187 U. S. 308, 47 L. Ed. 190	2
Federal Royalty Co. v. State, 124 Tex. 290, 77 S. W. (2) 1021	9
Ferguson v. Steen, 293 S. W. 318	8
Gasquet v. Lapeyere, 242 U. S. 367, 61 L. Ed. 367	2
Great N. R. Co. v. Sunburst O. & R. Co., 287 U. S. 358, 77 L. Ed. 360	4
Gunn v. Barry, 15 Wall 610, 21 L. Ed. 212	2
Hager v. Stakes, 116 Tex. 453, 294 S. W. 835	8
Hartford L. Ins. Co. v. Johnson, 249 U. S. 490, 63 L. Ed. 722	6
Hawks v. Hamill, 288 U. S. 52, 77 L. Ed. 610	7

	Page
Hendrickson v. Apperson, 245 U. S. 105, 62 L. Ed. 178	2
Herndon v. Georgia, 295 U. S. 441, 79 L. Ed. 1530, Anno 79 L. Ed. 1539-1541	6
McLean v. Commissioner, 120 Fed. (2) 942	10
Missouri P. R. Co. v. Hanna, 266 U. S. 184, 69 L. Ed. 235	7
Prince Bros. Drlg. Co. v. Fuhrman, 150 S. W. (2) 314	9
Quintana Petroleum Co. v. State, 134 Tex. 179, 133 S. W. (2) 112	10
Rhoads Drilling Co. v. State, 105 S. W. (2) 298	9
Seattle R. & S. R. Co. v. Washington, 231 U. S. 568, 58 L. Ed. 372	3
Sheffield v. Hogg, 124 Tex. 290, 77 S. W. (2) 1021	4, 9, 10
Sheppard v. Stanolind O. & G. Co., 125 S. W. (2) 643	9
Stair v. Smith, 209 S. W. 660	8
State v. Downman, 134 S. W. 787, 231 U. S. 353, 58 L. Ed. 264	8
State v. Quintana Pet. Co., 134 Tex. 179, 133 S. W. (2) 112, 128 A. L. R. 843	9
Stephens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S. W. 290	3, 8
Tennant v. Dunn, 130 Tex. 285, 110 S. W. (2) 53	9
Texas Co. v. Daugherty, 107 Tex. 226, 176 S. W. 717	8
Theo Oil Co. v. Thomas, 108 S. W. (2) 555	9
Thomason v. Veal, 144 S. W. (2) 361	9
Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. Ed. 382	5
U. S. v. Noble, 237 U. S. 74, 59 L. Ed. 846	9
Van Hoffman v. Quincy, 4 Wall 535, 18 L. Ed. 403	2
Victory v. Hinson, 129 Tex. 30, 102 S. W. (2) 194	9
Wabash R. Co. v. Flanagan, 192 U. S. 29, 48 L. Ed. 328	2
Waggoner Estate v. Wichita County, 273 U. S. 113, 71 L. Ed. 566	3, 7
Wick v. Chelan Elec. Co., 280 U. S. 108, 74 L. Ed. 212	2
Wilcox v. Hull Daisetta I. S. D., 95 S. W. (2) 490	9
Willoughby v. Chicago, 235 U. S. 45, 59 L. Ed. 123	6

SUPREME COURT OF THE UNITED STATES

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THE STATE OF TEXAS, *Respondent*

BRIEF OF RESPONDENT THE STATE OF TEXAS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ADDITIONAL STATEMENT

(Petitioner's Brief Pp. 1-5)

The nature and characteristics of the interest in land, taxes upon which constitute the subject matter of Respondent's suit, are the very crux of this litigation. These taxes were dues on an interest in the *production* from the oil and gas leases described (R-2), equivalent to 12-1/2% of the oil and gas produced therefrom, described as "Real Estate * * * an interest in an oil and gas leasehold estate, or what is commonly known and referred to as a one-eighth (1/8) or .125 oil payment or overriding oil-payment contract interest * * * " (R-2), characterized by Trial Court as " * * * the right to receive one-eighth of the proceeds of oil and gas produced from lands described in Plaintiff's petition * * * " (R-15).

The taxes sued for are admittedly unpaid. (R-15) Apart from the contention that Petitioner owned no interest in the land, no attack was made on the validity of the taxes sued for; the sole and only question being whether the interest owned by Respondent is an interest in land, for the purpose of taxation. (R-16)

REPLY TO GROUNDS OF JURISDICTION

Jurisdiction is lacking here because the judgments of the courts below are based wholly on a non Federal ground; that is, that under applicable local statutes, the interest or right owned by Petitioner is taxable as real property.

Caldwell v. Texas, 137 U. S. 692, 34 L. Ed. 816;
Van Hoffman v. Quincy, 4 Wall 535, 18 L. Ed. 403;
Gunn v. Barry, 15 Wall 610, 21 L. Ed. 212;
Hendrickson v. Apperson, 245 U. S. 105, 62 L. Ed. 178;
Equitable Life Assur. v. Brown, 187 U. S. 308, 47 L. Ed. 190;
Wabash R. Co. v. Flanagan, 192 U. S. 29, 48 L. Ed. 328;
Wick v. Chelan Elec. Co., 280 U. S. 108, 74 L. Ed. 212.

A final decision of the State court of last resort, based wholly on State law, is binding upon this Court and such decision is not reviewable here.

Gasquet v. Lapeyere, 242 U. S. 367, 61 L. Ed. 367;

Enterprise Irr. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 61 L. Ed. 644;
Seattle R. & S. R. Co. v. Washington, 231 U. S. 568, 58 L. Ed. 372.

Jurisdiction in the case at bar cannot possibly be predicated upon the pronouncements of this Court in *Waggoner Estate v. Wichita County*, 273 U. S. 113, 71 L. Ed. 566. That was an appeal from a United States Court; this Court expressly held that it was unnecessary to deal with the constitutional questions presented; that the interest involved, similar in all respects, except its duration, to that involved here, was properly taxed as realty, and that whether such interest was realty or personalty was a question of State law. The element of discrimination alleged in that case has not even been suggested in this controversy. That discrimination was the constitutional question referred to in the opinion is made perfectly clear by the review of the prior history of the case appearing on page 115 of the official reports, as follows: "They held also that the assessment was not discriminatory and did not violate the provisions of the 14th Amendment."

Complete misapprehension of the basis of the decision in Waggoner's case appears to have been responsible for its adoption as a ground of jurisdiction in this proceeding.

The Supreme Court of the State of Texas has made no change whatever in its rulings regarding the nature and taxability of interests in oil and gas from the very beginning of our jurisprudence. Indeed the sole and only authoritative determination in *Stephens County*

v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S. W. 290, relied on by Petitioner, was that an oil and gas lease, commonly known in the oil industry as a 7/8ths Working Interest, (the interest involved in this suit being a fractional portion of such leasehold estate, subject to limitation) is an interest in land and subject to taxation as real estate under Texas law.

Quotation of an isolated statement from that opinion, bearing upon a question not before the Court, may serve to reveal a veiled inconsistency of the langauge employed in dealing with the conventional 1/8 royalty interest of a land owner, with the language employed in the opinion in *Sheffield v. Hogg*, 124 Tex. 290, 77 S. W. (2) 1021, but certainly no conflict can be said to exist. The Court in the Stehpens case dealt with the lessee's interest while in the Sheffield case the lessor's interest was the subject of the controversy.

In no case has any Texas Court of last resort held, at any time, before or after the execution of the assignment under inquiry here, that any character of interest in the production or any right to be paid out of production of oil and gas, is anything other than real estate, under our law, as is conclusively demonstrated by even a cursory examination of the authorities.

Granting, however, argumentatively, that such a change occurred, how may a denial of any Federal constitutional right be reasoned? Aptly stated by Justice Cardozo in *Great N. R. Co. v. Sunburst O. & R. Co.*, 287 U. S. 358, 77 L. Ed. 360, at P. 366, the rule is that even if such a change occurred, and the change operated retroactively, no Federal constitutional guar-

anty would be invaded. Speaking for the Court, the Justice outlined the rule as follows: "This is not a case where a Court in overruling an earlier decision has given to the new ruling a retroactive bearing, and thereby has made invalid what was valid in the doing. *Even that may often be done*, though litigants not infrequently have argued to the contrary." *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 68 L. Ed. 382, and other cases of like nature are cited. (Emphasis ours.)

Petitioner, for the first time in the course of this litigation, made a tardy effort in his motion for rehearing in the Texas Court of Civil Appeals, endeavoring to inject into the case the semblance of a Federal question. His chief complaint is that he should have been permitted to pay taxes upon his property in Bexar County, the county of his residence, rather than in in Galveston County where the real estate is situated. Nowhere does he contend that he is not lawfully obligated to pay taxes to Respondent in one or the other of such counties. It is impossible to perceive any tenable ground of Federal jurisdiction of such a complaint.

SUMMARY OF ARGUMENT

1. That the Petition does not comply with Rule 38 of the Rules of this Court, presents no Federal question, and does not sustain jurisdiction in this Court.

2. That this Court is bound by the decisions of the courts of last resort of the State of Texas in passing upon the character of property owned by the Petitioner.

3. That Petitioner is the owner of an interest in land for the purpose of taxation, classified as real estate, under applicable statutes and the decisions construing them, of the State of Texas.

POINT ONE

That the Petition does not comply with Rule 38 of the Rules of this Court, presents no Federal question, and does not sustain jurisdiction in this Court.

The alleged Federal question was presented for the first time upon motion for rehearing in the State Court of Civil Appeals and came too late to sustain jurisdiction in this Court.

Hartford L. Ins. Co. v. Johnson, 249 U. S. 490, 63 L. Ed. 722;

Willoughby v. Chicago, 235 U. S. 45, 59 L. Ed. 123;

Amer. Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231;

Herndon v. Georgia, 295 U. S. 441, 79 L. Ed. 1530, Anno. 79 L. Ed. 1539-1541.

No Federal question was passed upon by the State Courts, which grounded their decisions wholly upon state property tax laws. In these circumstances no jurisdiction of the Petition in this Court can be sustained.

Missouri P. R. Co. v. Hanna, 266 U. S. 184, 69 L. Ed. 235.

Repeated statements, wholly unsupported by facts, that Petitioner has been denied equal protection cannot supply otherwise undiscoverable jurisdiction in this case. Moreover such statements cannot serve to confer jurisdiction in the complete absence of any claimed discrimination, or any tenable constitutional question, properly raised and passed upon, within the jurisdiction of this Court.

POINT TWO

That this Court is bound by the decisions of the courts of last resort of the State of Texas in passing upon the character of property owned by the Petitioner.

It is a fimiliar and universally recognized rule that the United States Courts are bound by the determinations of State Courts as to the meaning of State Statutes, and as to rules of property law of the several States.

Waggoner Estate v. Wichita Co., 273 U. S. 113, 71 L. Ed. 566;

Edward Hinds Yellow Pine Trustees v. Martin, 268 U. S. 458, 69 L. Ed. 1050;

Hawks v. Hamill, 288 U. S. 52, 77 L. Ed. 610.

The single question involved in this case is one of State property tax law. The courts of last resort of the State have finally passed upon this question both in this and prior cases involving the same and related issues. Nothing can be clearer than that this disposition, wholly uncomplicated by the injection of any bona fide constitutional question, is final and binding in this tribunal.

POINT THREE

That Petitioner is the owner of an interest in land for the purpose of taxation, classified as real estate, under applicable statutes and the decisions construing them, of the State of Texas.

From the very beginning of litigation which has laid the foundations of Texas property tax laws, fractional interests in oil and gas in place; indeed, any character of right to share in or be paid out of the proceeds of the sale of oil and gas produced from land has been held to be realty for the purpose of taxation.

Hager v. Stakes, 116 Tex. 453, 294 S. W. 835;
State v. Downman, 134 S. W. 787, 231 U. S. 353, 58 L. Ed. 264;
Texas Co. v. Daugherty, 107 Tex. 226, 176 S. W. 717;
Stephens County v. Mid Kansas O. & G. Co., 113 Tex. 160, 254 S. W. 290;
Ferguson v. Steen, 293 S. W. 318;
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Cobb v. Downing, 1 S. W. (2) 508, Appeal Dis. 278 U. S. 560, 73 L. Ed. 506, Cert. Den. 278 U. S. 646, 73 L. Ed. 559;

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Victory v. Hinson, 129 Tex. 30, 102 S. W. (2) 194;
Bracken v. Van Zandt Co., 74 S. W. (2) 540;
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Amer. Liberty Oil Co. v. State, 125 S. W. (2) 1107;
State v. Quintana Pet. Co., 134 Tex. 179, 133 S. W. (2) 112, 128 A. L. R. 843;
Tennant v. Dunn, 130 Tex. 285, 110 S. W. (2) 53;
Thomason v. Veal, 144 S. W. (2) 361;
Prince Bros. Drlg. Co. v. Fuhrman, 150 S. W. (2) 314;
Sheppard v. Stanolind O. & G. Co., 125 S. W. (2) 643.

The general rule that rents, royalties, or profits to accrue in the future, out of land, are interests in real estate, is supported by unbroken lines of decisions, both in the Courts of the State of Texas and in this Court.

U. S. v. Noble, 237 U. S. 74, 59 L. Ed. 846;
Barnsdall v. Bradford Gas Co., 225 Pa. 338, 74 A. 207, 26 L. R. A. (N. S.) 614.

The very interest here involved was determined by the United States Circuit Court of Appeals for this circuit, to be real estate.

McLean v. Commissioner, 120 Fed. (2) 942.

The recent decision of the Supreme Court of Texas, involving an interest identical in all respects to the interest owned by Petitioner, except for the absence here of the exact language of reservation there employed, is presented in *Quintana Petroleum Co. v. State*, 134 Tex. 179, 133 S. W. (2) 112, in which our court of last resort patently endeavored to state rules of general application and settle, once and for all, every question as to the proper procedure for taxation of any right, however created, to payment of money out of oil and gas production. The opinion is so clearly determinative of the controversy here presented as to leave no room for sensible argument.

The Texas rule as to interests of the nature of that owned by Petitioner is to be found in the opinion in *Sheffield v. Hogg*, 124 Tex. 290, 77 S. W. (2) 1021, as follows:

> "Reading the constitution and statutes together, there is no escape from the conclusion that the interests here involved are meant to be taxed as real estate. Classify them as you may, they are at least rights or privileges belonging or in some wise appertaining to real property, and the Legislature has provided that they be taxed as such."

Respondent prays that the petition for certiorari be denied.

Respectfully submitted,

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